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No. 84-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I.

THE CONFLICT WITH MONSANTO

Respondent characterizes the petition as an invitation to this Court "simply to second-guess the result reached by the Court of Appeals in applying the *Monsanto* standard." (Br. in Opp. 8) However, even respondent's adversarial summary of the evidence (Br. in Opp. 2-5) shows that the Ninth Circuit could not have followed the requirement in *Monsanto* that "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 104 S. Ct. at 1471.

First, respondent incorrectly states that the principal piece of evidence upon which it relies—the Ahlburg Memorandum—re-

ferred only to price as the reason for ADC's termination. (*See* Br. in Opp. 10) Respondent completely ignores the very first paragraph of the memorandum which focuses entirely on the competitive disadvantages of Buckingham's having two Arizona wholesalers:

> The state of Arizona is too small for two wholesalers selling our line. Forgetting all the standard cliches, shelf management is non-existent and uniform marketing that gets results cannot be coordinated with a dual. (Pet. 22a)

Buckingham's procompetitive reason to terminate one of its distributors—and, like its competitors, have an exclusive wholesaler—was conceded by ADC's president. (*See* Pet. 3-4, 20a) Thus, there was undisputed evidence which precluded a finding that the possibility of independent action was excluded.

Next, respondent has combed the record for every instance in which Buckingham uttered the word "price" (or even "programming") in the presence of one of its wholesalers. At most, these references reveal the type of conversations expressly allowed by *Monsanto*. Under *Monsanto*, even "the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions." 104 S. Ct. at 1470. Nor does Buckingham's desire to "firm up" Cutty Sark prices (Br. in Opp. 10) warrant an inference of conspiracy since "the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the *Colgate* doctrine allows." *Id.*

II.

REVIEWABILITY OF THE QUESTIONS PRESENTED

Respondent's argument that certiorari should be denied because the Court of Appeals' decision is "interlocutory" (Br. in Opp. 16) is simply erroneous. The directed verdict was based on a full trial record. The principal question presented for

review here—the quantum of evidence necessary for a dealer termination case to go to the jury on a price-fixing charge—would be no less ripe for review now than at the end of a second trial.[1] Moreover, even if the order below were interlocutory, that would not preclude certiorari since this Court has often reviewed interlocutory orders which present important questions.[2]

The questions here are important. They concern (among other things) the interplay between the *per se* rule and the quantum of proof required to infer a vertical price-fixing conspiracy, as well as the propriety of applying the *per se* rule in such cases. The Department of Justice asked this Court in *Monsanto* to reconsider the rationale of *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373 (1911). Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, filed Jan. 3, 1983, at 15-18, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (U.S.). In light of the submission of an amicus brief by the United States in *Monsanto* and the continued interest of the Government in the questions raised by Buckingham's petition, *see* Pet. 14 n.9, the Court may find it helpful to request an amicus brief from the United States with regard to this petition. *See, e.g., Copperweld Corp.* v. *Independence Tube Corp.*, 460 U.S. 1035 (1983).

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1 *See, e.g., Wood* v. *Strickland*, 420 U.S. 308 (1975), *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), and *Time, Inc.* v. *Pape*, 401 U.S. 179 (1971), in which this Court granted certiorari to review a court of appeals' reversal of a directed verdict. Compare *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967), cited by respondent (Br. in Opp. 16), where the questions presented were hypothetical since the circuit court had merely ruled on "various legal [contempt] issues" but had remanded to the district court "to consider whether there had in fact been a contempt." 389 U.S. at 328.

2 *See, e.g., Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n.*, 457 U.S. 702 (1982); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the Court should grant a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated: January 9, 1985

Respectfully submitted,

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